



# Convention on the Elimination of All Forms of Discrimination against Women

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## Committee on the Elimination of Discrimination against Women

### Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning communication No. 120/2017<sup>\*,\*\*</sup>

*Communication submitted by:* A.R.B.M. (represented by Women's Link)  
*Alleged victim:* The author  
*State party:* Spain  
*Date of communication:* 27 September 2017 (initial submission)  
*References:* Transmitted to the State party on  
13 November 2017 (not issued in document form)  
*Date of adoption of decision:* 18 February 2021

#### Background

1. The author of the communication is A.R.B.M., a Uruguayan national born in 1969. She claims that the State party has violated her rights under articles 2, 5 and 6 of the Convention. The Convention and the Optional Protocol thereto entered into force in the State party on 4 February 1984 and 6 October 2001, respectively. The author is represented by counsel, Gema Fernández Rodríguez de Liévana, from the non-governmental organization Women's Link.

#### Facts as submitted by the author

2.1 In 2005, the author was living in Montevideo and found herself in a desperate economic situation. Her daughter's mother-in-law asked whether she would like to go to work in Italy in the cleaning service of a hotel run by a friend of the family. She explained that they would make the travel arrangements for her and cover her expenses in advance, and the author would then repay the money from her earnings. The author thus incurred an initial debt of \$3,000.

\* Adopted by the Committee at its seventy-eighth session (15–26 February 2021).

\*\* The following members of the Committee participated in the examination of the present communication: Gladys Acosta Vargas, Hiroko Akizuki, Tamader Al-Rammah, Nicole Ameline, Marion Bethel, Leticia Bonifaz Alfonzo, Louiza Chalal, Corinne Dettmeijer-Vermeulen, Naéla Gabr, Hilary Gbedemah, Nahla Haidar, Dalia Leinarte, Rosario G. Manalo, Lia Nadaraia, Aruna Devi Narain, Bandana Rana, Rhoda Reddock, Elgun Safarov, Natasha Stott Despoja, Genoveva Tisheva, Franceline Toé-Bouda and Jie Xia. In accordance with rule 60 (1) (c) of the Committee's rules of procedure, Ana Peláez Narváez did not participate in the examination of the communication.



2.2 On 15 April 2005, the author travelled to Italy. At the airport, she was met by her daughter's father-in-law and two other men. They told her that she did not need to sign a contract as her stay would be short, and took her passport, telling her that it was not safe to carry it around with her. The next day, her daughter's father-in-law informed her that she would not be working in a cleaning service but would be sexually exploited. When the author refused, he threatened to harm her mother and daughter in Uruguay.

2.3 While the author was in Milan, Italy, under the control of the trafficking network, she was constantly monitored and forced to pay €40 a day for the room where she slept, in an apartment she shared with other women who were being exploited. She had to use almost all her "income" to repay the debt.

2.4 In August 2005, the author escaped from the trafficking network with the help of the taxi driver who usually drove her to the place of exploitation. She travelled across Europe to Vigo, Spain, where her sister lived. During the journey, she received several telephone calls from members of the trafficking network requesting the payment of €5,000 and threatening to kill her when she returned to Uruguay. When the author called her daughter, her daughter told her that she had been attacked and threatened by her in-laws after the author's escape. The author did not tell anyone about the crimes of which she had been a victim for fear of retaliation by her exploiters. From then on, she lived in her sister's house and worked as a cleaner, but never had a contract as she did not have a work permit.

2.5 On 21 August 2009, the police identified the author as a foreign national without a residence permit and opened a removal file, following which the Pontevedra government sub-office issued a removal decision. Despite this, the author remained in Spain.

2.6 On 27 August 2011, the author was assaulted by two men while visiting Gijón, Spain. She filed a complaint with the police who, on discovering that a removal order had been issued against her, detained her and requested that she be placed in the detention centre for migrants in Aluche, Madrid. On 29 August, Investigating Court No. 3 of Gijón authorized her placement, which occurred two days later.

2.7 On 5 September 2011, the police took the author from the detention centre for migrants to the airport for removal to Uruguay. She refused to get on the aeroplane, convinced that, if she returned to Uruguay, her traffickers would carry out their death threats. Following a struggle, the police took her back to the detention centre. The author was now aware of the real and imminent threat of removal to her country and decided to write a letter to the director of the detention centre explaining the situation and requesting protection.

2.8 On 14 September 2011, the author had an interview for the identification of victims of trafficking at the detention centre for migrants with three national police officers who were members of the VII Immigration Task Force of the Provincial Immigration and Border Unit. According to the author, identification as a victim of trafficking is a prerequisite for a person who has been trafficked to have access to the recognized victim protection system and the rights arising from it. In Spain, such interviews are conducted by the police and regulated by the Framework Protocol for the Protection of Victims of Trafficking in Persons, which has been adopted by the Ministries of Justice, the Interior, Employment and Social Security, and Health, Social Services and Equality, as well as by the Office of the Attorney General and the Council of the Judiciary. If it is considered that there are reasonable grounds to believe that persons in an irregular administrative situation have been victims of trafficking and they are not clear about their willingness to cooperate with the authorities in the prosecution of the crime, they have the right to request a recovery and reflection

period regulated by the Aliens Act.<sup>1</sup> If the reflection period is granted, the victim will not be removed for the duration of the reflection period. If it is denied, the person in question will not be considered a victim of trafficking by the authorities and will be, or may be, removed.

2.9 During the interview, the author stated that she was a victim of trafficking in persons and was willing to cooperate with the police in an investigation. After the interview, she called her daughter, who told her that she had heard through her in-laws that the author was going to be removed and that they were waiting for her. The author was very alarmed to hear this, as she interpreted it as a sign of the trafficking network's power and contacts.

2.10 On 16 September 2011, the government office in Madrid issued a decision in which it stated that, "following a review of the material in the case file, there are deemed to be no reasonable indications that the person in question is a victim of trafficking in persons".

2.11 On 6 October 2011, the police again attempted to remove the author. The author decided to make several cuts on her left forearm in an attempt to prevent her removal. When the police officers found her with wounds on her arms, they became very angry, and grabbed her arms forcefully to move her. According to the author, one of the police officers directed sexist and racist slurs at her, calling her a "fucking *sudaca*<sup>2</sup> bitch" and telling her to go back to her "fucking country". In response to her shouts and resistance, the agents used force and, in order to defend herself, the author scratched the arm of one of the police officers. The author was not removed and received medical assistance that night.

2.12 The police officer who had been scratched filed a complaint against the author. In a judgment of 9 December 2014, Madrid Criminal Court No. 20 sentenced the author to six months' imprisonment for resisting authority and a penalty of one month's imprisonment for the misdemeanour of assault. The author filed an appeal against this decision with the Madrid Provincial Court, which dismissed it on 24 March 2015, and subsequently submitted an application for *amparo* to the Constitutional Court; that application was declared inadmissible on 21 October 2015.

2.13 The author filed a complaint against the police officers who had treated her violently and insulted her using racist and sexist slurs. On 18 May 2012, Investigating Court No. 35 of Madrid provisionally closed the investigation, considering there to be insufficient grounds for anyone to be charged with the offences. Although the author provided additional information on the identity of the officers, the author claims that the investigation was not pursued. Investigating Court No. 11 of Madrid also conducted parallel investigations in relation to the same complaint. On 12 August 2013, Court No. 11 of Madrid issued a temporary stay of proceedings and, on 28 October 2014, Court No. 35 of Madrid decreed the proceedings closed following the principle that no one should be tried twice for the same offence. The author filed an appeal against the temporary stay of the proceedings. On 15 April 2015, the Madrid Provincial Court dismissed the appeal, noting that the author had refused to appear for examination by the forensic doctor, that there were no eyewitnesses to the events and that the only medical report in the file merely reported the author's self-harm. The author again requested for proceedings to be reopened, and her request was denied again by order of 26 February 2016.

2.14 On 11 October 2011, in Administrative Court No. 12 of Madrid, the author appealed against the decision of the government office in Madrid of 15 September

<sup>1</sup> See Organic Act 4/2000 of 11 January (2000) on the rights and freedoms of foreign nationals in Spain and their social integration, art. 59 bis (3).

<sup>2</sup> *Sudaca* is a derogatory term used in Spain to refer to migrants from South America.

2011 to deny a reflection period. The author alleged that the police and administrative authorities had carried out the identification process without safeguards, failing in their obligation to conduct an effective investigation into her evidence. In her appeal the author also provided further details about the crimes against her and about her perpetrators, such as the fact that she had learned that her daughter's father-in-law had been operating from Uruguay lately and was unable to travel to Italy because of a conviction in that country for trafficking in persons for purposes of sexual exploitation. The author requested precautionary measures on two occasions, at first for the provisional granting of a recovery and reflection period, and later to revoke the removal order against her. Her requests were denied on 11 and 21 October 2011, respectively. On 14 February 2012, Court No. 12 rejected the author's appeal, finding that "there could be no inference, let alone presumption, that she had been a victim of trafficking, as she claimed but which had in no way been established". The Court noted that the author's statement contained numerous inaccuracies and vague references. The author appealed against this decision, but her appeal was rejected by the High Court of Madrid on 15 July 2013. The High Court also highlighted the vagueness of the author's statement, which provided no details about her traffickers, and noted that six years had elapsed since the events with no new developments regarding the alleged trafficking. The author then filed an application for *amparo*, claiming that her rights to equality, non-discrimination, well-being and effective judicial protection had been violated. The application for *amparo* was dismissed by the Constitutional Court on 21 October 2015 on the basis that no fundamental rights had been violated.

2.15 The author filed a complaint with the European Court of Human Rights containing allegations similar to those submitted to the Committee. It was declared inadmissible on 29 September 2016 by the Court sitting in single-judge formation for failure to meet the admissibility criteria set forth in articles 34 and 35 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

### **Complaint**

3.1 The author claims that the State party violated articles 2, 5 and 6 of the Convention through its action and inaction in relation to her trafficking allegations and its attempts to remove her.

3.2 The author considers that the State party has failed to comply with its obligations under article 2 of the Convention in two ways. First, for failing in its obligation to investigate her allegations of sexual exploitation and for failing to protect her from the threat that removal would pose to her own life and that of her relatives. Second, for attempting to remove her from the country on two occasions, during which she was subjected to violence with a discriminatory component, which has not been investigated. The author considers that States parties have an obligation to take a non-discriminatory and gender-sensitive approach in their anti-trafficking action and that this obligation arises from article 2 of the Convention, as well as from the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Council of Europe Convention on Action against Trafficking in Human Beings.

3.3 The author notes that the Committee has expressed interest in States: (a) taking preventive and investigative measures that address the causes of trafficking;<sup>3</sup> (b) providing rehabilitation and social integration through assistance (including medical and psychological care), protection and temporary shelters for women in need of international protection, especially for victims of trafficking who do not wish to

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<sup>3</sup> See CEDAW/C/MKD/CO/4-5, para. 26; CEDAW/C/CHL/CO/5-6, para. 25; CEDAW/C/BLR/CO/7, paras. 21 and 22; and CEDAW/C/ECU/CO/7, para. 22.

cooperate with the authorities;<sup>4</sup> (c) increasing international, regional and bilateral cooperation with countries of origin, transit and destination to address trafficking;<sup>5</sup> (d) providing training on anti-trafficking legislation to authorities involved in assisting victims of trafficking (police officers, judges, border officials and social workers);<sup>6</sup> (e) increasing the number of traffickers prosecuted and punished;<sup>7</sup> (f) producing reliable statistics and data disaggregated by sex, age and nationality on the number of women and girls who are trafficked in order to combat the phenomenon;<sup>8</sup> (g) adopting specific laws on trafficking in persons;<sup>9</sup> and (h) establishing victim identification mechanisms and offering victims temporary residence permits.<sup>10</sup> General recommendation No. 32 (2014) on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women establishes that States parties should adopt and implement a gender-sensitive approach of a proper identification system for women asylum seekers and refugees that is not based on prejudices and stereotyped notions of women, including for victims of trafficking and/or sexual exploitation.<sup>11</sup>

3.4 The author claims that she was not recognized as a victim of trafficking because of the shortcomings of the victim identification process followed pursuant to the Aliens Act, which failed to protect her properly, in violation of the State party's due diligence obligation under article 2 of the Convention. The author considers that inclusion of that identification and granting of a recovery and reflection period mechanism in the Aliens Act, and not in another law, in itself highlights the fact that the State has chosen to prioritize immigration control over prosecution of the crime. In addition, the Framework Protocol for the Protection of Victims of Trafficking in Persons, which regulates the mechanism, provides that the police force responsible for controlling irregular immigration and investigating trafficking offences is also the only one with the legal capacity and competence to identify victims. This highlights a lack of gender perspective and leads to failures in the prosecution of trafficking networks. The author further notes that the Protocol grants the police and administrative authorities very broad discretion in determining whether an individual is a victim or alleged victim of trafficking. In addition, the author states that the identification interview took place at the detention centre for migrants, without legal or specialized assistance, and culminated in an unfounded and unreasoned negative administrative decision, in violation of the Aliens Act.<sup>12</sup> The author stresses the total absence from the file of any proceeding to investigate or verify the information she provided. There is also no record in the file that existing police mechanisms for coordinating with Italy were activated on the basis of the information she provided.

3.5 The author also claims that article 5 of the Convention was violated when State agents adopted a stereotyped view of her in two instances. Firstly, the author considers that the reason the national police concluded that there was no evidence a crime had been committed was because of a stereotype that migrant women are liars, willing to

<sup>4</sup> See [CEDAW/C/BEL/CO/7](#), paras. 24 and 25; [CEDAW/C/GRC/CO/7](#), para. 23; [CEDAW/C/BLR/CO/7](#), paras. 21 and 22; [CEDAW/C/ISR/CO/5](#), paras. 30 and 31; and [CEDAW/C/PRT/CO/7](#), para. 34.

<sup>5</sup> See [CEDAW/C/BEL/CO/7](#), paras. 24 and 25; and [CEDAW/C/ISR/CO/5](#), paras. 30 and 31.

<sup>6</sup> See [CEDAW/C/SLV/CO/7](#), paras. 25 and 26.

<sup>7</sup> See [CEDAW/C/LKA/CO/7](#), paras. 26 and 27; and [CEDAW/C/NZL/CO/7](#), para. 27.

<sup>8</sup> See [CEDAW/C/HRV/CO/4-5](#), para. 21; [CEDAW/C/CPV/CO/7-8](#), para. 20; and [CEDAW/C/CRI/CO/5-6](#), paras. 22 and 23.

<sup>9</sup> See [CEDAW/C/CPV/CO/7-8](#), para. 20; and [CEDAW/C/BRA/CO/7](#), paras. 21 and 22.

<sup>10</sup> See [CEDAW/C/NLD/CO/5](#), para. 29.

<sup>11</sup> See general recommendation No. 32 (2014) on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, para. 44.

<sup>12</sup> See Organic Act No. 4/2000 of 11 January 2000 on the rights and freedoms of foreign nationals in Spain and their social integration, art. 59 bis (3).

do anything to stay in Spain, and voluntarily engaging in prostitution. As a result of the application of these stereotypical notions to the author, the alleged crimes were not investigated, and the author was treated as an irregular migrant and was at risk of expulsion. Secondly, the insults and attacks to which she was subjected during the second attempt to remove her had a clear racist and sexist component.

3.6 Lastly, the author considers that the State authorities were obliged, under article 6 of the Convention, to investigate her allegations *ex officio*, because she should not have been made to bear the burden of proof. She notes that the Committee has encouraged States parties to ratify international, regional and institutional instruments to combat trafficking in persons and that article 6 should therefore be read in the light of the relevant international instruments applicable to Spain: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Council of Europe Convention on Action against Trafficking in Human Beings; Directive 2011/36/EU of the European Parliament and of the Council of the European Union of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims; and the Recommended Principles and Guidelines on Human Rights and Human Trafficking. The author emphasizes that the Special Rapporteur on violence against women, its causes and consequences has held that “due diligence generally, and specifically as far as violence against women is concerned, occurs when State authorities or others acting in an official capacity or under colour of law, know or have reasonable ground to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention”.<sup>13</sup> The obligations under article 6 include the obligation to identify victims of trafficking.<sup>14</sup> The duty to identify victims is also enshrined in the Council of Europe Convention on Action against Trafficking in Human Beings,<sup>15</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims,<sup>16</sup> and the Recommended Principles and Guidelines on Human Rights and Human Trafficking. In addition, the European Court of Human Rights has held that States must take the necessary measures to protect victims or potential victims of trafficking. Thus, risk assessments must be carried out on a case-by-case basis and the authorities have a duty to take action when they are “aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited”.<sup>17</sup> In this regard, the author notes that, as there was insufficient evidence to consider the author a victim, the burden of proof was placed on her. In fact, the authorities had an obligation to identify her as a victim of trafficking, using information from specialized organizations in the field and conducting an investigation. The author points out that both Spain and Italy are part of the Schengen area and victims of trafficking are therefore transported from one State to another with relative ease. Even though the trafficking took place in Italy, the Spanish authorities should have taken all necessary steps to coordinate with their Italian counterparts and facilitate an investigation. Furthermore, the State party has failed to respect the principle of non-refoulement in the case of the author, which is one of its obligations under article 6 of the Convention and general recommendation No. 32, since there were two attempts to remove her.

<sup>13</sup> See [A/HRC/23/49](#), para. 27.

<sup>14</sup> See [CEDAW/C/NLD/CO/5](#), para. 29. and [CEDAW/C/BEL/CO/7](#), paras. 24 and 25.

<sup>15</sup> See Council of Europe Convention on Action against Trafficking in Human Beings, art. 10.2.

<sup>16</sup> See Directive 2011/36/EU of the European Parliament and of the Council, art. 18.3.

<sup>17</sup> See European Court of Human Rights, *Rantsev v. Cyprus and Russia* (application No. 25965/04), judgment of 7 January 2010, para. 286.

**State party's observations on the admissibility and merits of the communication**

4.1 In a written communication dated 8 June 2018, the State party contested the admissibility of the communication and the assertion that it revealed a violation of the Convention.

4.2 The State party recalls that the author filed a complaint with the European Court of Human Rights, which was declared inadmissible on 29 September 2016. The State party notes that this decision, while brief, refers to the requirements contained in articles 34 and 35 of the European Convention on Human Rights. Since the complaint clearly meets all the other requirements set forth in those articles, the State party concludes that the ground for its inadmissibility can only have been that it was ill-founded or had already been duly considered by a national court, pursuant to article 35, paragraph 3 (a) and (b). Accordingly, an a priori analysis of the merits of the communication must have been carried out.

4.3 The State party notes that the author's request for a precautionary measure consisting of a stay of the decision of the government office in Madrid of 15 September 2011, which considered that there was no prima facie evidence of the author being a victim of trafficking, was denied by Administrative Court No. 12 of Madrid with reasoning and on the basis of legal doctrine, since negative administrative acts such as the decision in question cannot be stayed.<sup>18</sup> A precautionary measure is also inapplicable when the act in question does not impede the exercise of a freedom or impose an obligation but rather does not recognize rights that are being sought from the public authority concerned.<sup>19</sup> The decision was therefore legally founded and the right to effective judicial protection has not been violated.

4.4 In relation to the judicial decisions rendered on the merits of the author's complaint, both Administrative Court No. 12 of Madrid in its judgment of 14 February 2012 and the High Court of Madrid in its judgment of 15 July 2013 considered that, owing to the inaccuracies and vagueness of the author's statement, there could be no inference or presumption that she had been a victim of trafficking. In particular, the second court notes the time that has elapsed between the author allegedly fleeing Milan and making her statement, and points out that the author has been unable to provide the full names of the individuals who were holding her captive. The competent courts therefore found that the evidentiary standard of proof required by a court of law had not been met.

4.5 Concerning the criminal proceedings relating to this communication, the author's claims were rejected owing to a lack of evidence and therefore cannot be substantiated. In its conviction of 9 December 2014, Criminal Court No. 20 of Madrid considered that valid, sufficient and objectively evaluated evidence had been produced, with all the procedural safeguards, and that it was evident from the established facts that the accused had resisted her removal by insulting the agents and kicking one of them in the ribs on his left side and making several scratches on his left forearm. Consequently, there is no question of a violation of articles 2 and 5 of the Convention since it has been established that there is no evidence to support the author's statements and the judicial investigation by the two courts (criminal and administrative) revealed no violation of article 6 of the Convention.

4.6 The State party notes that the Constitutional Court declared inadmissible in limine the author's application for *amparo* on the ground that no fundamental rights

<sup>18</sup> See Supreme Court decisions of 20 February and 1 October 1990, 22 March, 16 July and 17 and 25 September 1991 and 3 September 1992.

<sup>19</sup> See Constitutional Court decision of 29 March 1990.

covered by that remedy had been violated. The author alleged in the Constitutional Court that her rights to effective judicial protection and to physical and mental well-being had been violated. However, her allegation that the safeguards were not respected relates to the very same judicial process in which there was judged to be insufficient evidence of an attack on her physical and mental well-being. In that regard, the doctrine of the Constitutional Court maintains that the right to effective judicial protection does not amount to a right to the consideration of claims on the merits. Rather, it indicates that matters will be examined by an independent court of law with all safeguards, without losing the right of the defence in the process, which has clearly been upheld in the present case.

4.7 The State party contends that an international body cannot change the facts established in the case files submitted if those facts have been determined in proceedings in which all safeguards were respected. The complaint submitted to the Committee cannot therefore involve a subsequent judicial instance, especially in the case of a State governed by the rule of law such as Spain, whose Constitution establishes that laws must be interpreted in accordance with the human rights treaties to which it is a party.

4.8 In the view of the State party, the author, on the pretext that her case has been decided on the basis of prejudices and stereotypes, which she fails to prove or establish in any way, claims that the Spanish State has violated her rights, even though, as has already been noted, the European Court of Human Rights has held that the State has not committed this alleged violation. The author has not met the need to provide real evidence beyond mere conjecture and interpretation regarding what may have happened. It follows from the decision of the European Court of Human Rights that, as asserted by the domestic courts, there is insufficient evidence to substantiate the author's complaint. The State party therefore requests the Committee, for reasons of legal certainty, to accept the decisions made by the courts, which were adopted after serious investigation and analysis.

#### **Author's comments on the State party's observations on admissibility and the merits**

5.1 In a written communication of 14 December 2018, the author submitted her comments on the observations of the State party. The author contends that the State party misinterprets the decision of inadmissibility of the European Court of Human Rights. She argues that, contrary to the State party's assertion, the fact that a matter has been duly considered by a national court is not grounds for inadmissibility, but rather is an essential component of the requirement of exhaustion of domestic remedies. She notes that, in the case *T.N. v. Denmark*,<sup>20</sup> the author had received a decision of inadmissibility identical to her own, and that that had led the Committee to indicate that, in its decision, the European Court had not provided sufficient reasoning or elements of information to allow the Committee to consider that the Court had examined the case in the sense of article 4, paragraph 2 (a), of the Optional Protocol. Therefore, from reviewing the case law, the author concludes that her case is not inadmissible because the merits of her complaint have not been considered by another international mechanism or procedure.

5.2 The author argues that the identification of victims of trafficking must be carried out by States parties on the grounds of evidence, not certainty, and that, on the basis of such evidence, States must offer protection. In accordance with the State party's case law,<sup>21</sup> the difficulty that women often have in proving their status as

<sup>20</sup> See *T.N. v. Denmark* (CEDAW/C/59/D/37/2012), paras. 8.4 and 12.4.

<sup>21</sup> See High Court of Aragon, Administrative Chamber, First Section, judgment No. 82/2015 of 16 February 2015, first legal ground.

victims or their accusations against traffickers stems from the very nature of the crime, as well as the context and circumstances surrounding it. When the State party asserts that the author did not provide sufficient evidence to support her allegations, it is confusing two different standards of evidence, namely, that applicable in a court of law and that applicable in the administrative process of identifying victims of trafficking, applying a significantly higher standard than would be appropriate to a victim of trafficking for the granting of a period of reflection. The recurrent references to the non-evidentiary nature of the author's statements demonstrate that the approach taken by the competent authorities in identifying victims of trafficking breaches obligations of due diligence in the protection of human rights. In its last two reports, the Group of Experts on Action against Trafficking in Human Beings for the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings noted the confusion on the part of the authorities of the State party between "reasonable grounds" and "objective evidence", recognizing that it is unlawful to require proof in order to consider a person as a victim of trafficking and offer him or her assistance and protection measures.<sup>22</sup>

5.3 In the author's view, the obligation to investigate her allegations rested with the police officers who received her statement. There is not in the administrative case file, nor does the State party now provide in its observations, any document proving that any investigative activity was initiated. The author maintains that States have an obligation of due diligence, which includes adopting and implementing diverse measures to tackle gender-based violence against women, including trafficking by non-State actors.<sup>23</sup> In that regard, the Special Rapporteur on trafficking in persons, especially women and children, has indicated that States have a due diligence obligation to identify victims of trafficking,<sup>24</sup> which is foundational for ensuring the fulfilment of many other aspects of due diligence, such as investigation and prosecution of traffickers, and the comprehensive protection of victims.<sup>25</sup> By arguing that the victim did not provide sufficient evidence, the State party is shifting the burden of proof back to the alleged victim, placing on the author the responsibility for proving the violence, when it is the State that is required to investigate the allegations. Indeed, because of the evidentiary difficulties presented by victims of gender-based violence, national and international courts have ruled that the burden of proof should be reversed.<sup>26</sup> In *V.K. v. Bulgaria*, the Committee considered the evidentiary standard applied by national courts in determining the need for protection measures, concluding that they applied a very high standard of proof "by requiring that the act of domestic violence must be proved beyond reasonable doubt, thereby placing the burden of proof entirely on the author, and concluded that no specific act of domestic violence had been made out on the basis of the collected evidence".<sup>27</sup> Furthermore, the State party took no action to coordinate its efforts with the Italian authorities, even though both countries are parties to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, and the Council of Europe Convention on Action against Trafficking in Human Beings, and

<sup>22</sup> See Group of Experts on Action against Trafficking in Human Beings, "Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Spain" (2018), paras. 139 and 151 (available in English and French).

<sup>23</sup> See general recommendation No. 35 (2017) on gender-based violence against women, para. 24.

<sup>24</sup> See [A/HRC/38/45](#), para. 73 (a) and (f).

<sup>25</sup> See [A/70/260](#), para. 24.

<sup>26</sup> See Directive 97/80/EC of the Council of the European Union of 15 December 1997 on the burden of proof in cases of discrimination based on sex, pp. 6–8; European Court of Human Rights, *Nachova and others v. Bulgaria* (application Nos. 43577/98 and 43579/98), judgment of 6 July 2005; and Inter-American Commission on Human Rights, *Simone André Diniz v. Brazil* (case 12.001), merit report No. 66/06 of 21 October 2006.

<sup>27</sup> See *V.K. v. Bulgaria* (CEDAW/C/49/D/20/2008), para. 9.9.

are bound by Directive 2011/36/EU of the European Parliament and of the Council of the European Union of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims. All three instruments provide for cooperation and collaboration among States in combating trafficking and protecting its victims.

5.4 With regard to the alleged role of gender and racial stereotypes in the identification process, the author reiterates that the State party systematically denies the veracity of her testimony without indicating the reasons why it considers that there was no evidence of trafficking, which demonstrates that the identification process and the related investigation of the facts were flawed and based on gender and racial stereotypes, as well as the preconceived idea that she was lying to prevent her removal. She indicates that the State party does not mention which mechanisms it has established to ensure that the authorities take their decisions on the basis of objective reasons and not prejudices or stereotypes regarding the origin of persons who claim to be victims of trafficking, usually foreign women in irregular situations who are the object of a series of preconceived ideas that may lead to discrimination. With regard to the alleged police attack to which she was subjected, the judicial authorities did not investigate the facts or question the officer involved in that regard, in breach of their duty to investigate claims of discriminatory motivations in the actions of State agents.

5.5 The author concludes that the communication is admissible and reveals a violation of articles 2, 5 and 6 of the Convention, as the State party still fails to explain which investigative measures it carried out in response to her allegations and did not assess the risk that her return posed to her life. Furthermore, the trafficking-victim identification process did not have sufficient safeguards to avoid the application of gender and racial stereotypes in relation to the credibility of her testimony and required her to meet a disproportionate standard of evidence.

### Third-party submissions

6.1 On 3 October and 5 November 2019, the Committee, through its Working Group on Communications under the Optional Protocol, authorized the submissions of Alda Facio and Frances Raday<sup>28</sup> and of the Follow-up Mechanism to the Belém do Pará Convention.

6.2 Alba Facio and Frances Raday consider that States parties have a due diligence obligation to prevent, investigate, prosecute and punish violence against women, including trafficking, as has been reiterated by many international bodies;<sup>29</sup> in the case of trafficking, the due diligence obligation begins as soon as the authorities “know or ought to know” of acts related to trafficking in their territory or jurisdiction, including extraterritorial jurisdiction.<sup>30</sup> They also claim that, when police forces are the sole authorities in charge of identifying victims, there can be major weaknesses in the fitness and preparedness of those forces, which are simultaneously tasked with combating irregular immigration and investigating other crimes.

<sup>28</sup> Alda Facio and Frances Raday are experts in international law in the areas of human rights and women’s human rights. Frances Raday is a former member of the Committee and the Working Group on the issue of discrimination against women and girls. Alda Facio is a member of the Working Group on the issue of discrimination against women and girls.

<sup>29</sup> See, for example, Belém do Pará Convention, art. 7; General Assembly resolution 48/104, art. 4 (c); European Court of Human Rights, *Opuz v. Turkey* (application No. 33401/02), judgment of 9 June 2009; Inter-American Court of Human Rights, *González et al. (“Cotton Field”) v. Mexico*, judgment of 16 November 2009; and African Committee of Experts on the Rights and Welfare of the Child, *Michelo Hansungule and others (on behalf of children in northern Uganda) v. Uganda*, communication No. 1/2005, decision of 19 April 2013.

<sup>30</sup> See general recommendation No. 30 (2013) on women in conflict prevention, conflict and post-conflict situations, para. 8.

6.3 For its part, the Committee of Experts of the Follow-up Mechanism of the Belém do Pará Convention reports that, in accordance with the standards of the inter-American system, a State's duty of prevention arises when, being aware of a situation of real and immediate risk, the State does not take reasonable action to prevent it.<sup>31</sup> In cases of violence against women, the duty of prevention is reinforced by the duty of due diligence, which extends to a situation of risk occurring in a context or pattern that enables the establishment of reasonable evidence that a woman is in danger. States therefore have an obligation to identify potential victims of trafficking according to the Follow-up Mechanism.<sup>32</sup> In addition, the Inter-American Court of Human Rights found that States must act with the strictest due diligence to protect and ensure the exercise and enjoyment of rights when faced with the fact or mere possibility of their violation by acts involving gender-based violence.<sup>33</sup> Hence, States have an obligation to investigate any possible situation of trafficking of which they are aware in order to prevent impunity and revictimization.<sup>34</sup> The burden of proof must also be reversed in trafficking investigation processes, as the authorities cannot claim that the victim did not sufficiently prove his or her status as such; rather, the State must act with due diligence to identify the nature of the violence and the woman as a victim.<sup>35</sup>

#### **Additional information from the author**

7.1 On 11 October 2019, the author clarified that the removal order against her had never been executed, owing to her resistance and the fact that, after the maximum period of stay in the detention centre for migrants had passed, she had been released and had remained in an irregular administrative situation. Approximately one year later, the author had been a victim of gender-based violence and as such had availed herself of the possibility of applying for a period of residence, owing to exceptional circumstances, for foreign women in an irregular administrative situation who are victims of gender-based violence.<sup>36</sup> The duration of that permit had been five years, expiring on 10 June 2018. The author had not been able to renew the permit because she had not been in stable employment and had since found herself once again in an irregular situation.

#### **State party's observations on the additional information from the author**

8.1 At the request of the Committee, acting through its Working Group on Communications, on 2 June 2020 the State party provided observations on the additional information from the author.

8.2 The State party asserts that the additional information from the author does not undermine or add any element of sufficient substance to alter the situation already

<sup>31</sup> See Inter-American Court of Human Rights, *Luna López v. Honduras*, judgment of 10 October 2013, para. 120; *González et al. ("Cotton Field") v. Mexico*, judgment of 16 November 2009, para. 280; and case *Pueblo Bello Massacre v. Colombia*, judgment of 31 January 2006.

<sup>32</sup> See Follow-up Mechanism to the Belém do Pará Convention, *Third Hemispheric Report on the Implementation of the Belém do Pará Convention: Prevention of Violence against Women in The Americas – Paths to Follow*, para. 87.

<sup>33</sup> See Inter-American Court of Human Rights, case *Velásquez Paiz et al. v. Guatemala*, judgment of 19 November 2015, para. 145.

<sup>34</sup> See Inter-American Court of Human Rights, case *Women Victims of Sexual Torture in Atenco v. Mexico*, judgment of 28 November 2018, paras. 270–272.

<sup>35</sup> See Inter-American Court of Human Rights, case *Fernández Ortega v. Mexico*, judgment of 30 August 2010, para. 181; and Inter-American Commission on Human Rights, *Ana, Beatriz and Celia Gómez Pérez v. Mexico*, report No. 53/01 of 4 April 2001.

<sup>36</sup> The author clarifies that this permit differs from the permit for victims of trafficking and is governed by article 31 bis of Organic Act No. 4/2000, of 11 January 2000, on the rights and freedoms of foreign nationals in Spain and their social integration, also known as the Aliens Act.

analysed, nor does it affect the decisions in domestic judgments. The State party reiterates that there is no appearance whatsoever of arbitrariness in the actions of the judicial authorities, to whom the author was able to submit all her allegations, which have been duly examined.

8.3 The State party also asserts that the intervention of third parties from the Committee of Experts of the Follow-up Mechanism of the Convention of Belém do Pará merely contributes a theoretical doctrinal study for the design or defence of what should be awareness-raising efforts to reduce discrimination, without helping to resolve the specific case.

#### **Author's comments on the additional observations of the State party**

9.1 At the request of the Committee, acting through its Working Group on Communications, on 6 July 2020 the author provided additional information on her residence. The author reports that she continues to reside in Spain in an irregular situation and maintains that she was not able to renew her residence permit for two main reasons: not having an employment contract and having a criminal record. The author claims that this precariousness in her residence status stems from the negative impact of her not having been identified and adequately protected as a victim of trafficking, because her criminal record stems precisely from the resistance she was obliged to put up when attempts were made to remove her. This, for the author, is one example of how victims of trafficking are socially excluded, because the authorities offer protection only to victims of trafficking whose cases can easily be prosecuted or lead to arrests of traffickers or trafficking networks, leaving those victims whose cases have no chance of success unprotected. This phenomenon is exacerbated by the fact that the police is responsible for investigating and prosecuting traffickers while identifying the victims of trafficking.

9.2 The author reiterates in her allegations that, in particular, she considers that the State party is confusing the right to effective judicial protection with the obligation to investigate acts of violence against women (para. 5.2). The author also reaffirms that she does not come before the Committee as a fourth instance, but to request the Committee to examine compliance with the Convention, including whether the response of the judicial authorities was adequate and complied with the procedural and material obligations contained in the Convention. The author considers that the judicial authorities, by imposing the burden of proof on her, ignored the obligation of the police authorities to investigate *ex officio* the facts related to trafficking in women and did not act with the due diligence that obliges States to prevent and respond to human rights violations.

9.3 The author believes that the application of stereotypes in gender-based violence investigations and its impact on the credibility of her statements is well documented.<sup>37</sup>

#### **Issues and proceedings before the Committee**

##### *Consideration of admissibility*

10.1 In accordance with rule 64 of its rules of procedure, the Committee must decide whether the communication is admissible under the Optional Protocol.

10.2 The Committee recalls that, under article 4, paragraph 2 (a), of the Optional Protocol, it is precluded from declaring a communication admissible when the same matter has been or is being examined under another procedure of international investigation or settlement. The Committee notes that the author filed a complaint

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<sup>37</sup> See general recommendation No. 33 (2015) on women's access to justice, para. 26.

with the European Court of Human Rights which was declared inadmissible on 29 September 2016 for failure to meet the admissibility criteria set forth in articles 34 and 35 of the European Convention on Human Rights. The Committee also notes that, according to the State party, it can be inferred from the decision of inadmissibility that the Court had conducted an examination of the merits of the communication, while the author maintains that there has been no such examination. The Committee has considered the Court's decision and notes that the decision contains only a single generic reference to articles 34 and 35 of the European Convention on Human Rights, which regulate a multiplicity of admissibility criteria, including purely formal criteria, without identifying the specific grounds for inadmissibility. Therefore, the Committee is of the view that the decision did not provide sufficient arguments or information to consider that the European Court has examined the case as provided for in article 4 (2) (a) of the Optional Protocol.<sup>38</sup> The Committee concludes that there is no impediment under the above-mentioned article with respect to the admissibility of the communication.

10.3 The Committee notes that the State party indicates that an international body cannot challenge facts accredited by domestic judicial authorities if those facts have been determined in proceedings in which all safeguards were respected. However, the Committee considers that the author is not merely questioning the manner in which the national authorities assessed the facts of her case, but is submitting to the Committee questions concerning the extent of the State party's obligations under the Convention and the impact of the decisions of the national judicial authorities on her rights under the Convention. The Committee is of the view that the communication is sufficiently substantiated for purposes of admissibility and falls within its competence.

10.4 The Committee, therefore, declares the communication admissible insofar as it raises questions under articles 2, 5 and 6 of the Convention, and proceeds to its consideration on the merits.

#### *Consideration of the merits*

11.1 The Committee has considered the present communication in the light of all the information made available to it by the author and by the State party, in accordance with article 7, paragraph 1, of the Optional Protocol.

11.2 The Committee recalls that, in accordance with article 6 of the Convention, States parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women. In addition, in accordance with paragraph 38 of general recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration:

International human rights law imposes positive obligations on States to identify victims of trafficking, a duty placed firmly on States, irrespective of the lack of self-identification by a victim. ... Survivors are often reluctant to self-identify or to disclose who has trafficked them for fear of retaliation, owing to lack of information on the crime and where to report it and to fear of engaging with authorities, including fear of being detained, prosecuted, punished and deported.

11.3 In that regard, the Committee stresses that stereotyping affects the right of women to be protected against gender-based violence and, in the present case, trafficking, and that the authorities responsible for preventing and combating trafficking must take care not to create inflexible standards of what women and girls

<sup>38</sup> See *T.N. v. Denmark* (CEDAW/C/59/D/37/2012), para. 12.4.

should be or what they should have done when confronted with a situation of trafficking, standards based merely on preconceived notions, rooted in a male-centred perspective of what defines a victim of trafficking. In combating trafficking in women, in accordance with paragraph 97 of general recommendation 38 (2020), States must:

Counter stereotypical attitudes and discrimination towards women and girls who are victims of trafficking and sexual exploitation, in particular migrants, by providing trauma-informed, gender-sensitivity and child-sensitivity training for individuals tasked with providing assistance and protection services, including to relevant authorities at the local and State levels, ... police officers, border officers, immigration personnel ....

11.4 Victims of trafficking have a special status and a right to special assistance and protection measures provided by the State. Long-term, needs-based, comprehensive, victim-centred assistance and protection measures are often lacking in anti-trafficking response measures due to poor victim identification and an insufficient definition of trafficking in national law and implementation thereof.<sup>39</sup> The Committee also considers that, on human rights and humanitarian grounds, States must provide access to free legal aid, grant, where possible, a reflection and recovery period and a residence permit pending formal identification to enable trafficked women and their dependants to take part in recovery and reintegration measures, which must be inclusive and accessible, not made conditional on their participation in the criminal justice process or the obtaining of a conviction against traffickers, including appropriate individualized, gender-sensitive, child-sensitive and trauma-informed emergency and longer-term access to accommodations, welfare benefits, educational and employment opportunities, high-quality medical care, including sexual and reproductive health services and counselling, the issuance of official identification documents free of charge, family reunification measures and asylum procedures, where relevant.<sup>40</sup>

11.5 The author claims that she is the victim of trafficking and considers that the refusal to investigate her claims, and the attempts to remove her, constituted a violation by the State party of its obligation to protect her and to prevent trafficking by investigating the crime, in violation of articles 2 and 6 of the Convention, and that that refusal was mainly attributable to the use of stereotyped prejudices, in violation of article 5 (a). She also claims to have been the victim of an attack involving stereotyped insults when an attempt was made to execute the order to remove her, and considers that both this act and the subsequent judgments constitute violations of article 5 (a) of the Convention.

11.6 With regard to the attack with stereotyped insults to which the author claims to have been subjected during the attempt to remove her, the Committee notes that the author considers that she was a victim of stereotyped prejudices that led to the attack on her and that the subsequent judgments were based on stereotyped prejudices. The Committee notes that the State party alleges that, after judicial review, with all safeguards, no attack on the author had been proven, whereas the author's attack on police officers had been proven. The Committee recalls that it is generally for the authorities of States parties to the Convention to evaluate the facts and evidence and the application of national law in a particular case, unless it can be established that the evaluation was biased or based on gender stereotypes that constitute discrimination against women, was clearly arbitrary or amounted to a denial of

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<sup>39</sup> See general recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration, para. 39.

<sup>40</sup> *Ibid.*, para. 92.

justice.<sup>41</sup> The question before the Committee is therefore whether there were any irregularities in the decision-making process that led to the establishment of the facts. The Committee notes that the facts relating to the alleged attack on the author by the officers and vice versa have been brought to the attention of the judicial authorities in two sets of proceedings. The proceedings arising from the author's complaint were closed. The Committee notes that there were no eyewitnesses to the incident, only earwitnesses; that the author refused to be examined by a forensic doctor; and that the only medical report in the file merely mentioned the author's self-harm. In the proceedings arising from the officers' complaint, which was examined by three different courts, it was decided to convict the author after the analysis of evidence, including medical reports and testimonies. The Committee notes that the author has not substantiated the extent to which the decisions taken at the domestic level suffered from manifest arbitrariness, denial of justice, or evidence of the use of stereotypes or biases contrary to the Convention. Accordingly, the Committee considers that the information in the file before it does not permit it to conclude that the facts are evidence of a violation of article 5 (a) of the Convention.

11.7 With regard to the author's claim that she is a victim of trafficking and as such should have had access to protection by the State, consisting in the first place of not removing her, and to an investigation based on the information she provided in her statement and in her administrative appeal, the author claims that the lack of an investigation resulted in discrimination against her and a failure to protect her rights as a victim of trafficking under article 6 of the Convention, and that the related court decisions were based on gender stereotypes. In that respect, the Committee noted that the State party's judicial authorities have considered and dismissed the possibility that the author was a victim of trafficking, noting that the author's statement contained numerous inaccuracies and vague references and that six years had elapsed since the alleged events with no new developments regarding the alleged trafficking. In particular, the High Court of Madrid, in its judgment of 15 July 2013, states that "there is, in the author's statement, complete vagueness with regard to all details concerning the persons whom she states forced her into prostitution, which is significant when she says that she was in contact with these persons for six months; it is also significant that she provides no details with regard to the persons who might threaten her in her country, especially if, as she states, her daughter was subjected to attacks there". While the author claims that those judgments are based on gender stereotypes, she cannot point to any specific aspects of those judgments that might indicate the use of such stereotypes. The Committee further notes that the limited information and documentation provided by the author to the Committee, and the time that has elapsed since the commission of the acts, in the territory of a third State that she left more than 15 years ago, without any proof of real danger to the author or her family, support the determination by authorities of the State party that her allegations were unsubstantiated.

11.8 The Committee emphasizes that, in the prevention of the crime of trafficking, consideration must be given to the nature of that crime and the difficulty encountered by its victims, who are often traumatized, in providing accurate and detailed information about their experiences.<sup>42</sup> The Committee notes, however, that because of the gaps and contradictions in the author's account, she has not been able to present sufficient arguments, either to the courts of the State party or to the Committee, to reverse the burden of proof and place it on the State party. Therefore, in this case, a reading of the decisions and the file do not provide the Committee with proof of manifest arbitrariness, denial of justice, or evidence of the use of stereotypes or biases

<sup>41</sup> See, for example, *S.J.A. v. Denmark* (CEDAW/C/68/D/79/2014), para. 7.8.

<sup>42</sup> See European Court of Human Rights (First Section), *S.M. v. Croatia*, (application No. 60561/14), judgment of 19 July 2018 (referral to the Grand Chamber), para. 80.

contrary to the Convention. Having found nothing that would require the Committee to depart from the State party's assessment of the facts and the conclusion that the author was not a victim of trafficking, the Committee considers that the facts in this case do not constitute evidence of any violation of the Convention.

12. In the light of the above, acting under article 7, paragraph 3, of the Optional Protocol to the Convention, the Committee is of the view that the facts before it do not reveal any violation of the rights of the author under article 6 of the Convention.

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